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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. ROBERT EARL HURST, Defendant and Appellant.	G040733 (Super. Ct. No. FVI020259) O P I N I O N

Appeal from a judgment of the Superior Court of San Bernardino County, J. David Mazurek, Judge. Affirmed as modified.

David L. Polsky, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Steve Oetting and Emily R. Hanks, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

INTRODUCTION

Defendant Robert Earl Hurst robbed Gregory Wheatley, whom defendant believed to be a drug dealer in possession of a significant amount of money. Wheatley, however, had no money, and Hurst shot him in the torso. A jury convicted defendant of attempted murder, assault with a semiautomatic firearm, and robbery. The jury found defendant acted with premeditation and deliberation, and found true numerous firearm enhancements.

On appeal, defendant argues there was insufficient evidence either that he had the specific intent to kill, or that he acted with premeditation and deliberation. We affirm. Shooting a person in the torso from two feet away, after threatening to "blow [his] brains out," when the victim is not resisting, fighting, or threatening the shooter in any way, is sufficient evidence of a specific intent to kill. Further, there was sufficient evidence of planning, motive, and the manner in which the shooting occurred to support a finding of premeditation and deliberation.

Defendant also argues the trial court should have stayed imposition of sentence on the robbery charge under Penal Code section 654, because the crimes of attempted murder and robbery were part of an indivisible course of conduct with a single intent and objective. (All further statutory references are to the Penal Code.) We disagree. Defendant shot Wheatley after Wheatley handed over his wallet, and the robbery was completed.

Finally, the Attorney General argues, and defendant concedes, that the trial court erred by staying imposition of sentence on a firearm discharge enhancement attendant to the robbery charge. We direct the trial court to impose a consecutive sentence of 25 years to life on the section 12022.53, subdivision (d) firearm enhancement.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

On November 2, 2004, defendant was at the Adelanto home of Gavin McClement. McClement's mother overheard people at her house say they wanted to rob Gregory Wheatley, a former drug dealer.

About 3:00 p.m., McClement saw defendant following Wheatley down the street. Wheatley sat down on the front steps of the apartment building where he worked, and defendant approached him. Defendant demanded money from Wheatley. Wheatley thought defendant was joking, so he laughed and stood up. Defendant pulled out a black, semiautomatic handgun and pointed it at Wheatley's head, saying he would shoot him in the head. Wheatley handed defendant his wallet. Defendant looked in the wallet and asked, "Where is the big money?" or "Is this all the money you have?" Wheatley answered he did not have any more money. Defendant shot Wheatley in the torso, rifled through his pockets, and left the scene with Wheatley's wallet and cell phone. Wheatley survived.

A jury convicted defendant of attempted murder (§§ 187, subd. (a), 664), assault with a semiautomatic firearm (§ 245, subd. (b)), and second degree robbery (§ 211). The jury found the attempted murder was willful, premeditated, and deliberate. The jury also found true the sentencing enhancement allegations that defendant personally used a firearm (§ 12022.53, subd. (b)), personally and intentionally discharged a firearm (§ 12022.53, subd. (c)), personally and intentionally discharged a firearm causing great bodily injury to the victim (§ 12022.53, subd. (d)), and personally caused great bodily injury to the victim (§ 12022.7, subd. (a)).

The trial court sentenced defendant to three years on the robbery count, a consecutive term of life with the possibility of parole on the attempted murder count, and a consecutive term of 25 years to life for personally and intentionally discharging a firearm causing great bodily injury to the victim, a sentencing enhancement attendant to

the attempted murder charge. Pursuant to section 654, the trial court stayed imposition of sentence for assault with a firearm, and for the remaining sentencing enhancements.

DISCUSSION

I.

THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE CONVICTION FOR DELIBERATE AND PREMEDITATED ATTEMPTED MURDER.

Defendant argues there was insufficient evidence of a specific intent to kill, requiring reversal of the conviction for attempted murder. Defendant also argues there was insufficient evidence supporting the jury's finding of a deliberate and premeditated act. "'In assessing the sufficiency of the evidence, we review the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citation.]" (*People v. Steele* (2002) 27 Cal.4th 1230, 1249.) We presume in support of the judgment the existence of every fact that could reasonably be deduced from the evidence. (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) We may reverse for lack of substantial evidence only if "'upon no hypothesis whatever is there sufficient substantial evidence to support'" the conviction. (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

A. *Intent to Kill*

"Attempted murder requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing." (*People v. Lee* (2003) 31 Cal.4th 613, 623.) The prosecution was required to prove defendant either desired the victim's death or knew, to a substantial certainty, that death would result from his actions. (*People v. Smith* (2005) 37 Cal.4th 733, 739.) "'The act of firing toward a victim at a close, but not point blank, range "in a manner that could have inflicted a

mortal wound had the bullet been on target is sufficient to support an inference of intent to kill . . . ." [Citation.]'" (*Id.* at p. 741.) Here, while robbing Wheatley, defendant pulled out a semiautomatic handgun, pointed it at Wheatley's head, and threatened to "blow [his] brains out." Then, standing just two feet away from Wheatley, defendant shot him in the left side of his torso. The bullet from defendant's gun injured a number of Wheatley's internal organs as it passed through his abdomen, ultimately lodging in his hip joint. The doctors were initially unsure whether Wheatley would recover. Wheatley was hospitalized for three and a half months, and underwent 13 surgeries due to his injuries. The way in which the shooting occurred supports an inference of defendant's specific intent to kill.

Defendant argues a specific intent to kill cannot be inferred from his commission of assault with a deadly weapon, citing *People v. Belton* (1980) 105 Cal.App.3d 376. We find that case wholly distinguishable. In *People v. Belton, supra,* 105 Cal.App.3d at pages 378-379, the defendant spent nine hours at his ex-wife's apartment, talking and drinking. Several hours after leaving, the defendant returned and twice tried to set the apartment on fire. (*Id.* at p. 379.) The appellate court affirmed the defendant's convictions for arson, but reversed the conviction for attempted murder. (*Id.* at p. 381.) The court noted, "there is a dearth of evidence to establish that defendant set the fires with an intent to murder Mrs. Belton. There were neither threats of personal injury, vows of vengeance, conversations about contemplated personal violence, or earlier attempts at murder. As noted above, specific intent to murder cannot be presumed merely from the defendant's setting fire to an inhabited building." (*Ibid.*) Here, there was far more evidence of a specific intent to kill than just the commission of assault with a deadly weapon, as detailed *ante*. There was sufficient evidence of defendant's specific intent to kill, independent of his commission of assault with a deadly weapon.

B. *Deliberate and Premeditated Act*

"A verdict of deliberate and premeditated first degree murder requires more than a showing of intent to kill. [Citation.] 'Deliberation' refers to careful weighing of considerations in forming a course of action; 'premeditation' means thought over in advance. [Citations.] 'The process of premeditation and deliberation does not require any extended period of time. "The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly. . . . " [Citations.]'" (*People v. Koontz* (2002) 27 Cal.4th 1041, 1080.) When determining whether there is sufficient evidence of premeditation and deliberation, attempted first degree murder is treated the same as first degree murder. (*People v. Herrera* (1999) 70 Cal.App.4th 1456, 1462, fn. 8.)

Our Supreme Court has explained what evidence may be considered by the trier of fact in reaching a finding of premeditation and deliberation: "(1) facts about how and what defendant did *prior* to the actual killing which show that the defendant was engaged in activity directed toward, and explicable as intended to result in, the killing—what may be characterized as 'planning' activity; (2) facts about the defendant's *prior* relationship and/or conduct with the victim from which the jury could reasonably infer a 'motive' to kill the victim, which inference of motive, together with facts of type (1) or (3), would in turn support an inference that the killing was the result of 'a pre-existing reflection' and 'careful thought and weighing of considerations' rather than 'mere unconsidered or rash impulse hastily executed' [citation]; (3) facts about the nature of the killing from which the jury could infer that the *manner* of killing was so particular and exacting that the defendant must have intentionally killed according to a 'preconceived design' to take his victim's life in a particular way for a 'reason' which the jury can reasonably infer from facts of type (1) or (2)." (*People v. Anderson* (1968) 70 Cal.2d 15, 26-27.) In other words, on appeal, we review the record for sufficient evidence of planning, motive, and manner.

In this case, defendant, armed with a loaded gun, followed Wheatley down the street just before the incident, supporting an inference of planning by defendant. (*People v. Elliot* (2005) 37 Cal.4th 453, 471 [arming oneself before committing a crime supports an inference of planning].) Shooting Wheatley after robbing him leads to an inference of motive – that defendant wanted to eliminate a potential witness to the crime. (*Ibid.*) Finally, the manner in which the shooting occurred supports an inference that defendant acted with premeditation and deliberation. Defendant shot Wheatley in the torso from a very short distance away. (*People v. Koontz, supra,* 27 Cal.4th at p. 1082.) There was no struggle, and Wheatley did not fight back against defendant; the "utter lack of provocation by the victim is a strong factor supporting the conclusion that appellant's attack was deliberately and reflectively conceived in advance." (*People v. Lunafelix* (1985) 168 Cal.App.3d 97, 102; see *People v. Marks* (2003) 31 Cal.4th 197, 230.)

There was substantial evidence of planning, motive, and the manner of the shooting, which supports the jury's finding that the attempted murder of Wheatley was premeditated and deliberate.

II.

THE TRIAL COURT DID NOT ERR BY FAILING TO STAY IMPOSITION OF SENTENCE ON THE ROBBERY CHARGE.

Section 654 prohibits multiple sentences where a single act violates more than one statute, or where the defendant commits different acts that violate different statutes but the acts comprise an indivisible course of conduct with a single intent and objective. (*Neal v. State of California* (1960) 55 Cal.2d 11, 19-20.) Whether section 654 applies is a fact question for the trial court, and the court's decision will not be reversed on appeal if there is substantial evidence supporting it. (*People v. Jones* (2002) 103 Cal.App.4th 1139, 1143.)

In this case, there was substantial evidence supporting the trial court's finding that the attempted murder and the robbery were divisible and were committed with different intents and objectives. Wheatley handed defendant his wallet before defendant shot him. Wheatley did not resist, fight back, or threaten defendant. The evidence supported the court's finding that the shooting was a gratuitous act of violence committed by defendant when the proceeds of the robbery were far less than he had expected. (*People v. Nguyen* (1988) 204 Cal.App.3d 181, 193 ["a separate act of violence against an unresisting victim or witness, whether gratuitous or to facilitate escape or to avoid prosecution, may be found not incidental to robbery for purposes of section 654"].)[1]

III.

THE TRIAL COURT ERRED BY STAYING IMPOSITION OF SENTENCE ON THE FIREARM DISCHARGE ENHANCEMENT ATTENDANT TO THE ROBBERY CHARGE.

The Attorney General argues, and defendant concedes, that the trial court erred by staying imposition of sentence on the firearm discharge enhancement under section 12022.53, subdivision (d), attendant to the robbery charge. Section 654 does not apply to sentencing enhancements under section 12022.53. (*People v. Palacios* (2007) 41 Cal.4th 720, 723.)[2] The judgment must be modified to add a consecutive term of 25 years to life.

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[1] At trial, Wheatley could not recall when he handed defendant his wallet. Immediately after the shooting, Wheatley told a police officer that defendant shot him *after* Wheatley handed over his wallet. Wheatley explained that his memory was much better on the day of the shooting than at trial, two and a half years later.

[2] Section 12022.53, subdivision (f) provides that only one enhancement under sections 12022.53 and 12022.7 may be imposed against a defendant for each crime of which he or she is convicted. Therefore, the trial court did not err by staying imposition of sentence on the other firearm enhancement allegations.

DISPOSITION

We direct the trial court to modify the abstract of judgment to impose a consecutive 25 years to life sentence for the section 12022.53, subdivision (d) firearm enhancement attendant to the robbery conviction. We further direct the trial court to forward a certified copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation. As modified, the judgment is affirmed.

FYBEL, J.

WE CONCUR:

SILLS, P. J.

RYLAARSDAM, J.